STATE OF MICHIGAN

COURT OF APPEALS

MARGARET ROBERTS,

Plaintiff-Appellee,

v

COUNTY OF OTSEGO,

Defendant-Appellant.

UNPUBLISHED
October 25, 2005

No. 254503
Otsego Circuit Court
LC No. 02-009968-NO

Before: Bandstra, PJ., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion for summary disposition based on its defense of governmental immunity. Because the sidewalk and curb upon which plaintiff fell is outside the building exception to governmental immunity, we reverse and remand for entry of summary disposition in favor of defendant.

On January 3, 2001, plaintiff went to a library owned and operated by defendant. Snow and ice had accumulated in the area. Plaintiff parked in the library parking lot located in front of the building. The building and sidewalk area in front of the building were separated from the parking lot by a curb that was approximately six inches in height. Plaintiff stepped up onto the curb with her left foot and attempted to do so with her right foot, but tripped when her right foot hit the curb cutout designed for use by wheelchairs. Plaintiff fell to the ground and sustained a serious injury to her left ankle.

Plaintiff filed suit, alleging that defendant negligently failed to maintain the sidewalk adjacent to and attached to the building in a reasonably safe condition, and that therefore, defendant was liable under the public building exception to governmental immunity. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that plaintiff's claim was barred by governmental immunity because the public building exception did not apply to areas adjacent to a public building, and that it had no duty to warn plaintiff of the presence of snow and ice because the condition was open and obvious.[1] The trial court

[1] Defendant does not rely on the open and obvious defense on appeal. In *Pierce v Lansing*, 265 Mich App 174, 184; 694 NW2d 65 (2005), a case decided after defendant submitted its brief on
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denied defendant's motion, concluding that the public building exception applied because the sidewalk was a part of the building itself.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). The applicability of governmental immunity is a question of law that we also review de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

Under the governmental immunity act, MCL 691.1401 *et seq*., a governmental agency has the obligation to repair and maintain public buildings under its control when the buildings are open for use by members of the public. A governmental agency is liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring that knowledge, failed to remedy the condition or to take the action reasonably necessary to protect the public. MCL 691.1406. The dangerous or defective condition must be one of the public building itself; however, the condition may be outside the external walls of the building itself. A fixture is part of a public building. An item is a fixture if it is annexed to realty, its adaptation or application to the realty is appropriate, and it was intended as a permanent accession to the realty. Under circumstances where a fixture analysis does not apply, in determining whether an item outside the external walls of a public building is part of the building, courts should consider whether the item or area where the injury occurred is physically connected to and is not intended to be removed from the building. *Fane v Detroit Library Comm*, 465 Mich 68, 77-78; 631 NW2d 678 (2001). "[M]ere sidewalks and walkways are clearly outside the scope of the public building exception." *Id*. at 76; see also *Horace v Pontiac*, 456 Mich 744, 757; 575 NW2d 762 (1998) (sidewalk adjacent to Silverdome not a part of the building itself).

The trial court's reliance on *Fane*, *supra*, as support for its decision was misplaced. In that case, the plaintiff was walking toward the main entrance to the Detroit Public Library. She climbed several steps and started to walk across a stone terrace, but fell and sustained injuries when she caught her heel on a raised portion of stonework. This Court, relying on *Horace*, *supra*, held that the defendant was entitled to summary disposition on the ground that the terrace was not part of the public building. The *Fane* Court reversed this Court's decision, noting that the terrace was built into the library building itself, and that if it were removed, the doors to library would be located several feet off the ground. The *Fane* Court concluded that because the terrace was "physically connected to and not intended to be removed from" the library building, it was part of the public building. *Fane*, *supra* at 79.

Fane, *supra*, does not hold that any sidewalk adjacent to a public building is part of the public building itself. Here, the sidewalk on which plaintiff fell is located in front of the library building. No evidence indicates that the sidewalk, as distinguished from the terrace at issue in *Fane*, *supra*, is built into the library building itself. If the sidewalk were removed, the doors to the library would still be accessible. A review of the photographs clearly reflects that the

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appeal, we held that the open and obvious danger defense to the common law duty to maintain premises does not apply to the statutory duty to maintain public buildings.

sidewalk and curb in question are of the normal perimeter variety adjacent to parking lots. The curb runs the entire width of the parking lot, it is outside the landscape features associated with the building, and forms a line of demarcation between the parking lot and the edge of the adjacent sidewalks leading to the building. Further, the perimeter sidewalk is open to the elements, outside the eaves, and distant from the entrance landings. We conclude that the sidewalk and curb at issue in this case is the type acknowledged by *Fane*, *supra*, and *Horace*, *supra*, to be outside the scope of the public building exception. *Fane*, *supra* at 76. Defendant was entitled to summary disposition. *Baker*, *supra*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio